Jaya Sudhir a/l Jayaram v Dato' Seri Timor Shah Rafiq & Ors and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(NCC)(W)-1904–12 OF 2020 AND W-02(NCC)(W)-1906–12 OF 2020
RAVINTHRAN, AZIMAH OMAR AND LIM CHONG FONG JJCA
5 MAY 2025

Contract — Collateral understanding — Existence of — Second respondent and third respondent entered into shareholders agreement in relation to shares in joint venture company — Shareholders agreement contained pre-emption clause — Third respondent transferred shares to appellant without first offering such shares to second respondent — Second respondent sued appellant premised on tort of inducement to breach contract and dishonest assistance — Appellant argued that there existed 'collateral understanding' between him and respondents which justified transfer of shares to him despite the existence of pre-emption clause — Whether 'collateral understanding' existed

Equity — Fiduciary duty — Breach — Dishonest assistance — Dishonest assistance to breach fiduciary duty — Whether ingredients of dishonest assistance established

Tort — Inducement of breach of contract — Whether ingredients proven

The dispute in the present case was over the shares of a joint venture company known as Nautilus Tug & Towage Sdn Bhd ('NTT'). Pursuant to a shareholders agreement ('the shareholders agreement'), Azimuth Marine Sdn Bhd ('AMSB') held 80% of NTT's shares whereas Nautical Supreme Sdn Bhd ('NSSB') held 20% of NTT's shares. Despite the existence of a pre-emption clause in the shareholders agreement, AMSB had transferred 100,000 of its shares in NTT to Jaya Sudhir, an investor in the joint venture, without first offering the shares to NSSB. NSSB then filed Suit 113 against Jaya Sudhir premised on the tort of inducement to breach a contract and the tort of dishonest assistance. In this suit, NSSB, amongst other reliefs, prayed for declaration that Jaya Sudhir was not entitled to the 100,000 NTT shares and also prayed for a mandatory injunction for the return of the shares. In response to Suit 113, Jaya Sudhir filed Suit 165 against the director of NSSB known as Dato' Seri Timor Shah Rafiq ('DST'), NSSB, AMSB, and NTT and argued that there existed a 'collateral understanding' between him, Suresh Emmanuel Abishegam ('Suresh') representing ASMB and DST representing NSSB which

justified the transfer of the NTT shares despite the existence of the pre-emption clause in the shareholders agreement. In this suit, Jaya Sudhir's claims were as followed: (a) as against DST and NSSB, a claim of inducement to breach the 'collateral understanding'; (b) as against DST, a claim of dishonest assistance and/or abetment and a claim of being an accessory to NSSB in facilitating a breach of the 'collateral understanding'; (c) as against NSSB, a claim premised on the tort of abuse of process to deprive him of the beneficial ownership of part of the NTT shares registered under AMSB; (d) an application to invoke estoppel against NSSB and DST (this was not pleaded by Jaya Sudhir); and (e) a declaration that his appointment as a director of NTT was valid. At the end of the case, the learned trial judge found that the existence of the 'collateral understanding' was not proven. Consequently, the learned trial judge dismissed all Jaya Sudhir's claims in Suit 165 except for his claim for a declaration that his appointment as a director of NTT was valid. The learned trial judge had also allowed NSSB's claim against Jaya Sudhir in Suit 113 and issued a mandatory injunction against him to retransfer the 100,000 NTT shares to AMSB. Dissatisfied with the decision, Jaya Sudhir filed: (i) Appeal 1904 against the High Court's decision in Suit 165; and (ii) Appeal 1906 against the High Court's decision in Suit 113. There were also cross-appeals by: (1) NSSB in relation to the High Court's decision during the course of trial in refusing to admit two emails (this cross-appeal was dismissed by the court upon preliminary point that this matter could not be the subject of a cross-appeal); and (2) AMSB seeking relief for Jaya Sudhir. The main issue that arose in the present appeals was whether the 'collateral understanding' as framed by Jaya Sudhir existed in respect of his participation. With respect to Appeal 1906, Jaya Sudhir raised a preliminary point ('the preliminary point') that the claims against him were all 'on an accessory/secondary liability basis' and were therefore, 'unsustainable' given that there ought to be a finding made on the principal/primary liability issue, which was currently pending before the arbitration. Thus, the primary liability was a live issue in the arbitration and not in the court. Therefore, the High Court ought not have a finding on primary liability. Furthermore, it would be a breach of the rules of natural justice as AMSB and NTT were not parties in Suit 113.

Held, dismissing Appeal 1904 with costs of RM50,000 in favour of the first respondent (DST) and the second respondent (NSSB) jointly, dismissing Appeal 1906 with costs of RM50,000 in favour of the respondent (NSSB), awarding Jaya Sudhir the costs of RM10,000 in respect of encl 92 of Appeal 1904, and dismissing the cross-appeal of the third respondent in Appeal 1904 (AMSB) with costs of RM25,000 in favour of the first respondent (DST) and the second respondent (NSSB):

(1) The court found that all the relevant letters had been thoroughly analysed and referred to in the judgment of the High Court. The learned trial judge also considered the shareholders agreement in its final form. It did

not admit any room for the existence of the 'collateral understanding' because of the strict pre-emption clause. The learned trial judge pointed out that it may well be that some clauses in the earlier drafts of the shareholders agreement allowed Jaya Sudhir to participate in the equity of NTT. These drafts were given to Jaya Sudhir. The said clauses were removed subsequently and replaced with clauses that allowed Jaya Sudhir to participate only in the equity of AMSB. The learned trial judge said that this fact 'speaks volumes in that this arrangement was reached deliberately by the parties'. The court in the present appeal had no reason to disagree with this conclusion as it was consistent with other correspondence that passed between the parties. For all the above reasons, the court was of the view that the High Court's finding that the so-called 'collateral understanding' did not exist was not plainly wrong and that interference with this finding of fact was clearly not warranted (see paras 45 & 47).

(2) The court agreed with the learned trial judge that the claim based on estoppel that created legal relations also failed as it was not pleaded and appeared to be an afterthought. Furthermore, as the trial judge noted, the estoppel argument based on the 'collateral understanding' argument which Jaya Sudhir had failed to establish and was therefore 'bereft of foundation'. Jaya Sudhir also claimed that AMSB held 50% of NTT shares in trust for him. However, only 10% shares of NTT were disputed by the main adversaries, ie Jaya Sudhir and DST/NSSB in the present appeals. Jaya Sudhir did not seek any relief against AMSB for 50% of the NTT shares purportedly held in trust on his behalf by AMSB (see para 48).

(3) In relation to the preliminary point, both AMSB and NTT were parties in Suit 165 which was tried together with Suit 113 where the issue of primary and secondary liability arose. Therefore, AMSB and NTT had the requisite knowledge to intervene in Suit 113 but did not. Further, the court opined that a plaintiff was not required to sue and obtain judgment against all tortfeasors at the same time or in the same action. In the present case, the court noted that NSSB and AMSB had brought the issue of breach of the shareholders agreement to arbitration because they were bound to do so by the arbitration agreement contained in it. As stated by the trial judge, to accede to the preliminary point raised by Jaya Sudhir and dismiss Suit 113 would have caused manifest injustice (see paras 52–53).

(4) In respect of merits of the findings of the High Court regarding the tort of inducement of the breach of contract, the court found that appellate interference was not warranted. As found by the High Court, the ingredients of this tort were proven. There was no serious dispute that it was Jaya Sudhir who requested for the transfer of the 10% NTT shares

without complying with the pre-emption clause in the shareholders agreement. He certainly knew of the existence of the shareholders agreement and could have requested a copy of the same. The learned trial judge also rightly found that there was intent on the part of Jaya Sudhir, as he could not have effected the transfer of shares into his own name without procuring a breach of the shareholders' agreement (see para 54).

(5) As for the claim regarding dishonest assistance, the court agreed with the learned trial judge that the ingredients for dishonest assistance were established as well and that appellate interference was not warranted. The High Court correctly found that by the terms of the shareholders agreement, AMSB, NSSB and NTT owed fiduciary duties to each other. Jaya Sudhir in causing the transfer of the shares in question to himself by requesting the same from Suresh in violation the pre-emption clause clearly assisted in the breach of the shareholders agreement. The court therefore found that the injunctive order granted for re-transfer of the shares to AMSB was proper based on authorities the learned trial judge cited (see para 55).

(6) As for NSSB's cross-appeal in respect of the exclusion of two emails, the court had already dismissed it earlier on a preliminary point that it should not have been taken up by way of cross-appeal. As for the cross-appeal of AMSB, it was against the part of the judgment in Suit 165 wherein the High Court dismissed Jaya Sudhir's claim. This cross-appeal was basically in support of Jaya Sudhir claim as argued by counsel for NSSB. Since the claim of Jaya Sudhir based on 'collateral understanding' had failed, the court accordingly for the same reasons, dismissed this cross-appeal with costs (see para 56).

[Bahasa Malaysia summary

Pertikaian dalam kes semasa adalah mengenai saham-saham dalam syarikat usaha sama yang dikenali sebagai Nautilus Tug & Towage Sdn Bhd ('NTT'). Menurut satu perjanjian pemegang-pemegang saham ('perjanjian pemegang-pemegang saham tersebut'), Azimuth Marine Sdn Bhd ('AMSB') memegang 80% saham NTT manakala Nautical Supreme Sdn Bhd ('NSSB') memegang 20% saham NTT. Walaupun wujud fasal keutamaan membeli dalam perjanjian pemegang-pemegang saham tersebut, AMSB telah memindahkan 100,000 daripada sahamnya di dalam NTT kepada Jaya Sudhir, pelabur dalam usaha sama tersebut, tanpa terlebih dahulu menawarkan saham tersebut kepada NSSB. NSSB kemudiannya memfailkan Saman 113 terhadap Jaya Sudhir berdasarkan tort dorongan untuk melanggar kontrak dan tort bantuan tidak jujur. Dalam saman ini, NSSB, antara lain, memohon pengisytiharan bahawa Jaya Sudhir tidak berhak mendapat 100,000 saham NTT dan juga memohon injunksi mandatori untuk pemulangan saham tersebut. Sebagai tindak balas kepada Saman 113, Jaya Sudhir memfailkan Saman 165 terhadap pengarah NSSB yang dikenali sebagai Dato' Seri Timor

Shah Rafiq ('DST'), NSSB, AMSB, dan NTT dan berhujah bahawa wujudnya 'persefahaman kolateral' antara beliau, Suresh Emmanuel Abishegam ('Suresh') yang mewakili ASMB dan DST yang mewakili NSSB, di mana persefahaman kolateral ini menjustifikasikan pemindahan saham tersebut walaupun terdapat fasal keutamaan membeli di dalam perjanjian pemegang-pemegang saham tersebut. Dalam saman ini, tuntutan-tuntutan Jaya Sudhir adalah seperti berikut: (a) terhadap DST dan NSSB, tuntutan dorongan untuk melanggar 'persefahaman kolateral' tersebut; (b) terhadap DST, tuntutan bantuan tidak jujur dan/atau persubahatan dan tuntutan menjadi aksesori kepada NSSB dalam memudahkan pelanggaran 'persefahaman kolateral' tersebut; (c) terhadap NSSB, tuntutan berasaskan tort penyalahgunaan proses untuk melucutkan pemilikan benefisial sebahagian daripada saham NTT yang didaftarkan di bawah AMSB; (d) permohonan untuk menggunakan estoppel terhadap NSSB dan DST (ini tidak diplid oleh Jaya Sudhir); dan (e) pengisytiharan bahawa pelantikannya sebagai pengarah NTT adalah sah. Di akhir kes, hakim bicara yang bijaksana mendapati bahawa kewujudan 'persefahaman kolateral' tersebut tidak dibuktikan. Akibatnya, hakim bicara yang bijaksana menolak semua tuntutan Jaya Sudhir dalam Saman 165 kecuali tuntutannya untuk pengisytiharan bahawa pelantikannya sebagai pengarah NTT adalah sah. Hakim bicara yang bijaksana juga telah membenarkan tuntutan NSSB terhadap Jaya Sudhir dalam Saman 113 dan memerintahkan injunksi mandatori terhadapnya untuk memindahkan semula 100,000 saham NTT kepada AMSB. Tidak berpuas hati dengan keputusan tersebut, Jaya Sudhir memfailkan: (i) Rayuan 1904 terhadap keputusan Mahkamah Tinggi dalam Saman 165; dan (ii) Rayuan 1906 terhadap keputusan Mahkamah Tinggi dalam Saman 113. Terdapat juga rayuan-rayuan balas oleh: (1) NSSB berhubung dengan keputusan Mahkamah Tinggi semasa perbicaraan yang enggan menerima dua emel (rayuan balas ini telah ditolak oleh mahkamah atas bantahan awal bahawa perkara ini tidak boleh menjadi subjek rayuan balas); dan (2) AMSB yang ingin memohon relif untuk Jaya Sudhir. Isu utama yang timbul dalam rayuan-rayuan semasa adalah sama ada 'persefahaman kolateral' seperti yang dirangka oleh Jaya Sudhir wujud berhubung penyertaannya. Berkenaan dengan Rayuan 1906, Jaya Sudhir membangkitkan satu bantahan awal ('bantahan awal tersebut') bahawa tuntutan terhadapnya semuanya adalah 'atas asas liabiliti tambahan/sekunder' dan oleh itu, 'tidak mampan' memandangkan sepatutnya ada dapatan dibuat mengenai isu liabiliti pokok/utama, yang pada ketika ini masih belum selesai di hadapan timbang tara. Oleh itu, liabiliti utama adalah isu langsung dalam timbang tara dan bukan dalam mahkamah. Oleh yang demikian, Mahkamah Tinggi tidak sepatutnya mempunyai dapatan mengenai liabiliti utama. Tambahan pula, ia akan menjadi pelanggaran peraturan keadilan asasi kerana AMSB dan NTT bukan pihak dalam Saman 113.

Diputuskan, menolak Rayuan 1904 dengan kos RM50,000 memihak kepada responden pertama (DST) dan responden kedua (NSSB) secara bersesama,

menolak Rayuan 1906 dengan kos RM50,000 memihak kepada responden (NSSB), memberikan Jaya Sudhir kos sebanyak RM10,000 bagi lampiran 92 dalam Rayuan 1904, dan menolak rayuan balas responden ketiga dalam Rayuan 1904 (AMSB) dengan kos RM25,000 memihak kepada responden pertama (DST) dan responden kedua (NSSB):

(1) Mahkamah mendapati bahawa semua surat yang berkaitan telah dianalisis dan dirujuk dengan teliti dalam penghakiman Mahkamah Tinggi. Hakim bicara yang bijaksana juga mempertimbangkan perjanjian pemegang-pemegang saham tersebut dalam bentuk muktamadnya. Ia tidak menunjukkan apa-apa ruang untuk kewujudan 'persefahaman kolateral' tersebut disebabkan oleh fasal keutamaan membeli yang ketat. Hakim bicara yang bijaksana menegaskan bahawa mungkin beberapa klausa dalam draf terdahulu perjanjian pemegang-pemegang saham tersebut membenarkan Jaya Sudhir mengambil bahagian dalam ekuiti NTT. Draf ini diberikan kepada Jaya Sudhir. Klausa tersebut telah dikeluarkan kemudiannya dan digantikan dengan klausa yang membenarkan Jaya Sudhir untuk mengambil bahagian hanya dalam ekuiti AMSB. Hakim bicara yang bijaksana berkata bahawa fakta ini 'speaks volumes in that this arrangement was reached deliberately by the parties'. Mahkamah dalam rayuan semasa tidak mempunyai sebab untuk tidak bersetuju dengan kesimpulan ini kerana ia konsisten dengan surat-menyurat lain yang diutus antara pihak-pihak. Atas semua sebab di atas, mahkamah berpendapat bahawa keputusan Mahkamah Tinggi tentang ketidakwujudan apa yang dipanggil sebagai 'persefahaman kolateral' bukanlah jelas salah dan campur tangan terhadap dapatan fakta ini jelas tidak wajar (lihat perenggan 45 & 47).

(2) Mahkamah bersetuju dengan hakim bicara yang bijaksana bahawa tuntutan berdasarkan estoppel yang mewujudkan hubungan undang-undang juga gagal kerana ia tidak diplid dan kelihatan seperti pemikiran terkemudian. Tambahan pula, seperti yang dinyatakan oleh hakim bicara, hujah estoppel adalah berdasarkan hujah 'persefahaman kolateral' yang gagal dibuktikan oleh Jaya Sudhir dan oleh itu 'tiada asas'. Jaya Sudhir juga mendakwa AMSB memegang 50% saham NTT sebagai amanah untuknya. Walau bagaimanapun, hanya 10% saham NTT dipertikaikan oleh pihak-pihak utama, iaitu Jaya Sudhir dan DST/NSSB dalam rayuan-rayuan semasa. Jaya Sudhir tidak memohon apa-apa relif terhadap AMSB untuk 50% saham NTT yang dikatakan dipegang sebagai amanah bagi pihaknya oleh AMSB (lihat perenggan 48).

(3) Berhubung dengan bantahan awal tersebut, kedua-dua AMSB dan NTT adalah pihak dalam Saman 165 yang telah dibicarakan bersama Saman 113 di mana timbul isu liabiliti utama dan sekunder. Oleh itu, AMSB dan NTT mempunyai pengetahuan yang diperlukan untuk campur

tangan dalam Saman 113 tetapi mereka tidak berbuat demikian. Selanjutnya, mahkamah berpendapat bahawa plaintif tidak perlu menyaman dan mendapatkan penghakiman terhadap semua tortfeasor pada masa yang sama atau dalam tindakan yang sama. Dalam kes semasa, mahkamah mengambil perhatian bahawa NSSB dan AMSB telah membawa isu pelanggaran perjanjian pemegang-pemegang saham tersebut kepada timbang tara kerana mereka terikat untuk berbuat demikian melalui perjanjian timbang tara yang terkandung di dalamnya. Seperti yang dinyatakan oleh hakim bicara, untuk bersetuju dengan bantahan awal yang dibangkitkan oleh Jaya Sudhir dan menolak Saman 113 akan menyebabkan ketidakadilan yang nyata (lihat perenggan 52–53).

(4) Berkenaan dengan merit dapatan Mahkamah Tinggi berhubung tort dorongan pelanggaran kontrak, mahkamah mendapati bahawa campur tangan rayuan adalah tidak wajar. Seperti yang didapati oleh Mahkamah Tinggi, intipati tort ini telah dibuktikan. Tidak ada pertikaian serius bahawa Jaya Sudhir yang meminta pemindahan 10% saham NTT tanpa mematuhi fasal keutamaan membeli yang terkandung dalam perjanjian pemegang-pemegang saham tersebut. Dia pastinya mengetahui tentang kewujudan perjanjian pemegang-pemegang saham tersebut dan boleh meminta salinannya. Hakim bicara yang bijaksana juga telah membuat dapatan yang betul bahawa terdapat niat di pihak Jaya Sudhir, kerana dia tidak boleh melaksanakan pemindahan saham ke dalam namanya sendiri tanpa menggalakkan pelanggaran perjanjian pemegang-pemegang saham tersebut (lihat perenggan 54).

(5) Bagi tuntutan mengenai bantuan tidak jujur, mahkamah bersetuju dengan hakim bicara yang bijaksana bahawa intipati untuk bantuan tidak jujur juga telah dibuktikan dan campur tangan rayuan adalah tidak wajar. Mahkamah Tinggi dengan betul mendapati bahawa mengikut terma-terma perjanjian pemegang-pemegang saham tersebut, kesemua AMSB, NSSB dan NTT mempunyai kewajipan fidusiari antara satu sama lain. Jaya Sudhir dalam menyebabkan pemindahan saham berkenaan daripada Suresh kepada dirinya sendiri yang melanggar fasal keutamaan membeli tersebut jelas telah membantu dalam pelanggaran perjanjian pemegang-pemegang saham tersebut. Oleh itu mahkamah mendapati bahawa perintah injunksi yang diberikan untuk pemindahan semula saham-saham tersebut kepada AMSB adalah wajar berdasarkan autoriti-autoriti yang dipetik oleh hakim bicara yang bijaksana (lihat perenggan 55).

(6) Bagi rayuan balas NSSB berkenaan dengan pengecualian dua emel yang berkenaan, mahkamah telah pun menolaknya sebelum ini atas bantahan awal bahawa ia tidak sepatutnya ditangani melalui rayuan balas. Bagi rayuan balas AMSB, rayuan ini adalah terhadap bahagian penghakiman

dalam Saman 165 di mana Mahkamah Tinggi menolak tuntutan Jaya Sudhir. Rayuan balas ini pada asasnya menyokong tuntutan Jaya Sudhir seperti yang dihujahkan oleh peguam bela NSSB. Memandangkan tuntutan Jaya Sudhir berdasarkan 'persefahaman kolateral' telah gagal, mahkamah sewajarnya atas sebab yang sama, menolak rayuan balas ini dengan kos (lihat perenggan 56).]

Cases referred to

Guan Teik Sdn Bhd v Haji Mohd Noor bin Haji Yakob & Ors [2000] 4 MLJ 433, CA (refd)

Lumley v Gye (1953) 118 ER 749, KBD (folld)

Appeal from: *Jaya Sudhir a/l Jayaram v Dato' Seri Timor Shah Rafiq & Ors* [2018] MLJU 364 (High Court, Kuala Lumpur)

Cyrus Das (with Robert Low, Austen Pereira, Karen Yong Hwei Woon, Chong Lip Yi, Khong Mei Yan and Stephanie Chong Keh Yin) (Rosli Dahlan Saravana Partnership) in Civil Suit Nos W-02(NCC)(W)-1904–12 of 2020 and W-02(NCC)(W)-1906–12 of 2020 for the appellant.

Pang Kong Leng (with Chok Zhin Theng, Lim See Kheng) (Cheah Teh & Su) in Civil Suit No W-02(NCC)(W)-1904–12 of 2020 for the first and second respondents.

Lim Tuck Sun (with Anneliz Reina George and Mohamed Hazazi Khalaff bin Abdul Hamid) (Chooi & Co) in Civil Suit No W-02(NCC)(W)-1904–12 of 2020 for the third respondent.

Olivia Loh (with Lai Ann Xing) (Gananathan Loh) in Civil Suit No W-02(NCC)(W)-1904–12 of 2020 for the fourth respondent.

Pang Kong Leng (with Chok Zhin Theng, Lim See Kheng) (Cheah Teh & Su) in Civil Suit No W-02(NCC)(W)-1906–12 of 2020 for the respondent.

Ravinthran JCA:

INTRODUCTION

[1] There are two main appeals before us, ie W-02(NCC)(W)-1904–12 of 2020 ('Appeal 1904') and W-02(NCC)(W)-1906–12 of 2020 ('Appeal 1906') and two cross-appeals. Both main appeals are by Jaya Sudhir a/l Jayaram ('Jaya Sudhir'). They originate from two suits that were tried together after consolidation, ie Suit No 22NCC-165–05 of 2017 ('Suit 165') and Suit WA-22NCC-113–03 of 2018 ('Suit 113'). In addition, there are two cross-appeals; one from Nautical Supreme Sdn Bhd ('NSSB') and from Azimuth Marine Sdn Bhd ('AMSB'). It must be mentioned here that in the course of the hearing of the instant appeals, the cross-appeal of NSSB which is in relation to the non-admission of two emails during the course of trial was dismissed upon a preliminary point. We shall advert to it in the later part of this

judgment. Thus, what remained during the substantive arguments were the two main appeals and the cross-appeal of AMSB. Parties approached the arguments in these appeals on the footing that Appeal 1904 which is from Suit 165 as the lead appeal. We shall first set out the facts and issues pertaining to Appeal 1904 for ease of understanding before moving to the other appeal.

BACKGROUND FACTS

[2] The dispute in this case is over the shares of joint venture company known as Nautilus Tug & Towage Sdn Bhd ('NTT') which was incorporated on 7 September 2012. It had been awarded a lucrative contract to provide tug boat services by Vale Malaysia Minerals Sdn Bhd ('Vale Malaysia') which is owned by a big international company.

[3] The equity structure in NTT at the time the dispute arose was and remains as follows. The majority shareholding (80%) is held by Azimuth Marine Sdn Bhd (AMSB) whereas the minority 20% shareholding is held by Nautical Supreme Sdn Bhd (NSSB). This joint venture shareholding ratio resulted from a shareholders agreement dated 15 March 2013 signed by AMSB, NSSB and NTT.

[4] The paid capital of NTT was one million ordinary shares at RM1 per share which meant that AMSB held 800,000 shares whereas NSSB held 200,000 shares. The shareholders agreement also provided that out of the total of six directors, four are to be from AMSB and two are to be from NSSB. It is critical to note also that the shareholders agreement contained a pre-emption right in cl 9. It provided no shares are to be transferred to third-parties unless the other shareholder is given a first option to acquire it. The pre-emption clause also stipulated the method to assess market value of the shares.

[5] We shall now refer to some key individuals involved in the suits. Jaya Sudhir is the plaintiff in Suit 165 and the defendant in Suit 113. He is also the appellants in Appeals 1904 and 1906. Suresh Emmanuel Abishegam ('Suresh') is a director of AMSB and the key individual behind the said company. He, together with Dato' Ahmad Johari bin Abdul Razak ('Johari'), Ajaib Hari Dass ('Hari Dass') and Dato' Dr Abd Latiff bin Ahmad ('Latiff') were nominated by ASMB to sit on the board of NTT. Jaya Sudhir was appointed as the alternate director to Latiff on the board of NTT.

[6] AMSB was sued by Jaya Sudhir as the third defendant in Suit 165. However, as noted by the trial judge, AMSB is not Jaya Sudhir's main adversary in the litigation. Jaya Sudhir main adversary in the litigation is one Dato' Seri Timor Shah Rafiq ('DST'). He is the first defendant in Suit 165. DST, along with Dato' Wan Mohamed Yaacob bin Dato' Wan Salaidin (with Syed Feisal

Alhady as his alternate), was nominated by NSSB to sit on the board of NTT.

[7] We shall now refer to some crucial events that precipitated the dispute between the litigants. After the shareholders agreement was signed between AMSB, NSSB and NTT, AMSB transferred 100,000 of its 800,000 shares to Jaya Sudhir. The transfer was approved by the Board of Directors of NTT on 16 December 2015 and shares were registered in Jaya Sudhir's name on 1 April 2016. On 2 November 2016, Jaya Sudhir was appointed as a director of NTT.

[8] The transfer was disputed by NSSB. It issued a notice of termination of the shareholders agreement to AMSB on 11 October 2016. Subsequently, on 17 October 2016, AMSB issued its own notice of termination of the shareholders agreement to NSSB.

[9] The dispute between the parties to the shareholders agreement is subject to the arbitration clause contained in it. NSSB took the position that the transfer by AMSB of 100,000 of its NTT shares to Jaya Sudhir was a breach of the shareholders agreement, particularly the pre-emption clause. The dispute between NSSB and AMSB with respect to this issue is currently pending arbitration proceedings. However, the arbitration has been stayed pending the outcome of the instant court proceedings, which involves Jaya Sudhir who is not a party to the shareholders agreement and therefore not a party in the pending arbitration matter.

NSSB'S SUIT AGAINST JAYA SUDHIR

[10] In August of 2016, NSSB sued Jaya Sudhir (Suit 113) in tort. NSSB pleaded that Jaya Sudhir procured and/or induced a breach of the shareholders agreement by AMSB. It further pleaded that the parties to the shareholders agreement owed fiduciary duties to one another, and that Jaya Sudhir had induced AMSB to breach those duties by causing the share transfer in contravention of the said agreement. It was also claimed by NSSB that Jaya Sudhir had assisted a breach of trust in relation to the transfer of the said shares to him and that he was in knowing receipt of trust property. NSSB, amongst other reliefs, prayed for declaration that Jaya Sudhir was not entitled to the 100,000 NTT shares and also prayed for a mandatory injunction for the return of it.

[11] In his defence, Jaya Sudhir denied the tortious claims. He pleaded that NSSB and AMSB agreed at the outset that he would participate directly in the equity of NTT or through entities in which he had a controlling interest.

JAYA SUDHIR'S SUIT AGAINST DST, NSSB, AMSB AND NTT

[12] In May of 2017, about nine months after the institution of NSSB's suit against him, Jaya Sudhir sued DST, NSSB, AMSB and NTT in Suit 165. Although, Jaya Sudhir was not a party to the shareholders agreement, he claimed that there existed 'principal terms' to his participation as an investor in the joint venture involving NTT. He also claimed the existence of a 'collateral understanding' between DST, NSSB and AMSB which entitled him to participate in the equity of NTT.

[13] In Part E of the statement of claim, Jaya Sudhir said that the principal terms of his participation as an investor were as follows:

(a) he and AMSB would jointly hold 80% of NTT shares;

(b) NSSB would be allocated 20% of NTT shares but the former would pay for 10% only. The balance would be paid by AMSB and him;

(c) that it was further agreed between them the 80% NTT shares would be initially registered in the name of AMSB where part of it would be held on trust for him as he is the beneficial owner;

(d) he would directly hold shares in NTT at a later date or through AMSB and that no further consent is needed for divestment of part of AMSB's NTT shares to him; and

(e) that he is allowed to participate in NTT because of the 'collateral understanding' between the parties in question to that effect as he provided 'white knight' services for the joint venture to be successful. He paid on behalf of NSSB for part of its stake in NTT (10% of the 20% shares) and used his connections in procuring a large loan from Export-Import Bank Malaysia Bhd ('Exim Bank') for tug boat operations.

[14] Jaya Sudhir further pleaded that NTT was actually, by reason of the 'collateral understanding', a joint venture between him, Suresh representing AMSB and DST representing NSSB. The 'collateral understanding' was breached when NSSB issued the notice of breach of the shareholders agreement. He pleaded that both DST and NSSB conspired to defraud him and deprive him of the 100,000 NTT shares that were transferred to him. In respect this allegation, Jaya Sudhir also pleaded the tort of inducement against DST for breaching and/or interfering with the 'collateral understanding'. Related to this plea also, was the allegation made by Jaya Sudhir that DST had 'dishonestly assisted and/or aided and abetted and/or was an accessory to NSSB in facilitating the breach' of the 'collateral understanding'. Finally, in respect of the legal proceedings commenced by NSSB, ie court action and arbitral proceedings, Jaya Sudhir pleaded the tort of abuse of process to deprive him of

A the beneficial ownership of part of the 80% NTT shares registered under AMSB.

[15] The learned trial judge observed that all the claims and averments of Jaya Sudhir revolved around and stemmed from the existence of the alleged B 'collateral understanding' between him, DST representing NSSB and Suresh representing AMSB. As noted by the learned trial judge, perhaps only the validity of the appointment of Jaya Sudhir as a director which is an issue in both suits is not dependent on the existence of the 'collateral understanding'. The C appointment of Jaya Sudhir as a director is not an issue in this appeal as NSSB did not appeal the finding of the High Court that the appointment was valid.

[16] It will be recalled that AMSB and NSSB had issued notice of termination of the shareholders agreement and their dispute is pending D arbitration proceedings that had been stayed. Their counterclaims against each other in Suit 165, where both are defendants, were also stayed pending arbitration. At the trial, Jaya Sudhir's contention in respect of the existence of the 'collateral understanding' was supported by AMSB though it was a defendant. This is the reason the learned trial judge noted that AMSB is not the E real adversary of Jaya Sudhir despite being a defendant in Suit 165. As for NTT, being a joint venture entity, it adopted a neutral stance.

DECISION OF HIGH COURT IN SUIT 165 (APPEAL 1904)

F **[17]** The learned trial judge directed himself that Jaya Sudhir's claim in Suit 165 that he instituted about the existence of the 'collateral understanding' may provide a defence to Suit 113 instituted by NSSB. For this reason, the learned trial judge considered the claim in Suit 165 first. We also noted earlier that the parties in these appeals agreed that Appeal 1904 which pertains to Suit G 165 should be treated as the lead appeal.

[18] The learned trial judge firstly observed that Jaya Sudhir did not plead that the so-called 'collateral understanding' is a binding contract in the statement of claim. Nonetheless, His Lordship proceeded to consider all the H evidence to make a determination whether the Jaya Sudhir had proved the existence of 'collateral understanding' in the first place. Jaya Sudhir case was that the 'collateral understanding' justified the transfer of the NTT shares despite existence of the pre-emption clause in the shareholders agreement. Clause 9 required consent from the other shareholder for the transfer of shares I to a third-party.

[19] On the other hand, DST and NSSB in their defence pleaded a so-called 'actual understanding' that existed between the parties. For being a third-party investor in the joint venture project of NTT and efforts in securing loan for it,

Jaya Sudhir was only meant to participate in the equity of AMSB which held 80% of the shares of NTT. In other words, the 'actual understanding' allows only indirect participation in the equity stake of the joint venture company whereas the 'collateral understanding' envisaged direct participation of Jaya Sudhir.

[20] Jaya Sudhir gave evidence supporting the existence of the 'collateral understanding'. Suresh who represented AMSB transferred the disputed 100,000 NTT shares to Jaya Sudhir. Despite AMSB being a defendant in Suit 165, Suresh supported the evidence of Jaya Sudhir. DST who represented the NSSB disputed the existence of the 'collateral understanding'. Faced with directly conflicting testimony of witnesses, the learned trial judge directed himself on the authority of *Guan Teik Sdn Bhd v Haji Mohd Noor bin Haji Yakob & Ors* [2000] 4 MLJ 433 that the court must not only weigh the conflicting oral evidence but also consider the surrounding circumstances and the contemporaneous documents.

[21] The learned trial judge examined numerous correspondences, especially emails that passed between Jaya Sudhir, Suresh and DST including drafts of the shareholders agreement in the run-up to the final version that was signed. He also considered the oral evidence of Jaya Sudhir and DST in respect of their respective understanding of the manner in which the former would participate in NTT, ie whether directly or indirectly. His Lordship found that there was no evidence to support the claim of Jaya Sudhir that the 'collateral understanding' that he pleaded existed. Thus, Jaya Sudhir had no right to participate directly in NTT unless the pre-emption right enshrined in cl 9 in the shareholders agreement was complied with. In the instant case, he found as a fact based on the evidence of DST and the emails tendered in evidence that NSSB never gave consent for the 100,000 shares that were transferred to Jaya Sudhir by AMSB. As for the oral evidence of Suresh that supported Jaya Sudhir's version that the 'collateral understanding' existed, the learned trial judge found that the former's evidence was inconsistent with the contemporaneous emails that he himself had issued.

[22] Having made the finding that the existence of the 'collateral understanding' was not proven, he proceeded to make the following orders in respect of Suit 165. His Lordship held that all the causes of action in Suit 165 predicated on the 'collateral understanding' would stand dismissed including the claim of inducement to breach the 'collateral understanding' against the DST and NSSB, claim against DST of dishonest assistance and/or abetment and claim of being an accessory to NSSB in facilitating a breach of the 'collateral understanding'. The claim of abuse of process and conspiracy to defraud Jaya Sudhir was also dismissed. The learned trial judge also dismissed the application of Jaya Sudhir to invoke estoppel (which was not pleaded

anyway) against NSSB and DST as the 'collateral understanding' was not proven. However, in respect of Jaya Sudhir's prayer for a declaration that his appointment as a director of NTT was valid, the learned trial judge noted that it is not dependent on the existence of the 'collateral understanding'. He found that it was accordance with the shareholders agreement. He allowed a declaration to the effect that the appointment of Jaya Sudhir as a director of NTT was valid.

DECISION OF HIGH COURT IN SUIT 113

[23] This suit, brought by NSSB against Jaya Sudhir, arose from the transfer of the disputed NTT shares. On the evidence, the learned trial judge noted that there is no dispute that the shares were transferred to Jaya Sudhir. Suresh testified that he caused the transfer of the 100,000 NTT shares belonging to AMSB at the request of Jaya Sudhir who did not deny that he made such a request. However, he claimed that the 'collateral understanding' allowed him to take up shares in NTT.

[24] The learned trial judge considered whether Jaya Sudhir procured or induced AMSB to breach the shareholders agreement. His Lordship found as a fact that Jaya Sudhir would have known about the pre-emption clause even though he was not party to the shareholders agreement. There were numerous exchanges of emails between the parties preceding the execution of the shareholders agreement and Jaya Sudhir was also given previous drafts of the said agreement. These drafts carried cl 9 which is the pre-emption clause. The learned trial judge also found that Jaya Sudhir was in a position to obtain a copy of the shareholders agreement from AMSB since he knew of the existence of it. Therefore, the learned trial judge said that Jaya Sudhir cannot credibly claim ignorance of the pre-emption clause. The learned trial judge further found that Jaya Sudhir's act in requiring the said NTT shares to be transferred to him based on the 'collateral understanding' was irreconcilable with the pre-emption right of NSSB in cl 9 of the shareholders agreement.

[25] The learned trial judge dismissed the argument that Jaya Sudhir could have held any honest belief that he was entitled to cause the transfer of the NTT shares to him because of the 'collateral understanding' or any other agreement to similar effect. He found such an understanding was not probable in the light of all the contemporaneous documents that were issued prior to the execution of the shareholders agreement which specifically provided for the pre-emption clause. For the above reasons, the learned trial judge found on a balance of probabilities that Jaya Sudhir procured or induced AMSB to breach the shareholders agreement.

[26] The other tortious claim against Jaya Sudhir was the tort of inducing

breach of fiduciary duties. It was pleaded that the parties to the shareholders agreement owed fiduciary duties to each other. By inducing a breach of the shareholders agreement, it was argued that Jaya Sudhir also committed an actionable wrong, ie the tort of inducing a breach of fiduciary duty. The learned trial judge noted that no decided case law supports the existence of this tort. After discussing the case for the creation of such a tort, the learned trial judge declined to recognise it in this case and dismissed the claim.

[27] Next, the learned trial judge addressed the tort of dishonest assistance and knowing receipt. Again, this tort was predicated on the transfer of the 100,000 NTT shares to Jaya Sudhir which NSSB claimed they would have had an option to purchase by virtue of the pre-emption clause. The learned trial judge found that the parties to the shareholders agreement had placed trust and confidence in one another not to act contrary to the interest of any other party. He thus found that NSSB and AMSB owed fiduciary duty to one another. Consequently, the learned trial judge found that Jaya Sudhir had knowingly assisted and caused AMSB to breach the fiduciary duty it owed to NSSB.

[28] In respect of the tort of knowing receipt, the learned trial judge considered principles that apply to trust property. NSSB had claimed that its trust property was the equitable interest in the 100,000 NTT shares that were transferred to Jaya Sudhir. However, the learned trial judge found that the right of pre-emption which was triggered by the notice given by Suresh about transfer of shares to Jaya Sudhir, did not create an equitable interest in the 100,000 NTT shares in favour of NSSB. The reason is that NSSB did not opt to buy the shares or pay for it. They merely had an option to do so. The notice only created an equity in favour of NSSB to buy the 100,000 NTT shares. Therefore, the learned trial judge found that the 100,000 NTT shares did not constitute 'property' or 'assets' held in trust for NSSB for the purpose of the tort of knowing receipt. However, the learned trial judge said that in view of the wrongful transfer of shares to Jaya Sudhir, he allowed the prayer for mandatory injunction for the shares to be retransferred to AMSB.

[29] Finally, the learned trial judge dismissed the prayer for a declaration that the appointment of Jaya Sudhir as director of NTT was unlawful.

[30] The summary of the reliefs that the learned trial judge granted in Suit 165 and Suit 113 are found in para [422] of the judgment which is reproduced below:

(i) Sudhir's claim in Suit 165 is allowed to the extent that it is declared that his appointment onto the Board of Directors of NTT was valid;

(ii) NSSB's claim against Sudhir in Suit 113 is allowed and a mandatory injunction against Sudhir is issued for the retransfer of the 100,000 NTT

A shares to AMSB within fourteen days from service of the order and in default the Deputy or Senior Assistant Registrar is empowered to execute the necessary transfer instruments to effect there transfer as per prayers 39.3 and 39.4 of the amended statement of claim.

B ISSUES IN THE APPEALS

[31] As we said earlier, Jaya Sudhir's claim in Suit 165 that his appointment as director in NTT valid was allowed. All the claims arising from the alleged 'collateral understanding' were dismissed. In Appeal 1904 Jaya Sudhir has C appealed against the dismissal of these claims. NSSB did not appeal against the finding that the appointment of Jaya Sudhir as director was valid.

[32] NSSB claims in Suit 113 were partially allowed. The 100,000 NTT shares in Jaya Sudhir's name were ordered to be retransferred to AMSB. Other D reliefs sought by NSSB including a declaration that the appointment of Jaya Sudhir was invalid was dismissed. In Appeal 1906, Jaya Sudhir has appealed against the decision of the High Court to grant a mandatory injunction for the transfer of the shares to AMSB. NSSB did not file any appeal against the E dismissal of other reliefs that it had sought in Suit 113.

[33] However, NSSB and AMSB had filed cross-appeals. The cross-appeal of NSSB is with respect to the decision of the High Court during the course of trial not to admit two emails. A preliminary point was raised at the outset that F it cannot be the subject of a cross-appeal. We upheld the preliminary point and dismissed the cross of appeal NSSB.

[34] The cross-appeal of AMSB is to seek relief for Jaya Sudhir. We shall first deal with the issues with respect to the Appeal 1904 which is the lead appeal.

G

COLLATERAL UNDERSTANDING

[35] Whether 'collateral understanding' as framed by Jaya Sudhir existed in respect of his participation is central to both appeals. Jaya Sudhir's case for its H existence is based on the early history of the joint venture in question and his deep involvement in it. We make brief reference to it before proceeding to consider whether the High Court erred in making a finding of fact that the 'collateral understanding' did not exist. The learned trial judge found that what existed was the 'actual understanding' to the effect that Jaya Sudhir can only I participate at the level of AMSB which held 80% shares in NTT. The learned trial judge found that the 'actual understanding' is consistent with shareholders agreement that crystallised the arrangement between AMSB, NSSB and NTT. However, Jaya Sudhir's argument is that he not bound by the shareholders agreement as he is not a party to it and that 'collateral understanding' is

between him, Suresh representing AMSB and DST representing NSSB.

[36] Jaya Sudhir argued his case that the trial judge erred in finding that his role as an investor in the joint venture and as the proverbial 'white knight' always meant that he was to participate directly in the equity of NTT. He referred to the history of the joint venture. NSSB belongs to the Dwitasik group of companies. Vale Malaysia offered them a contract to provide tug boat services. Suresh who is a Captain and Master Mariner from the Azimuth group of companies provided the knowhow in the project. However, the joint venture ran into financial difficulties. The Vale project over time required the service provider to undertake the building of tug boats. That required a lot of money. Nothing significant happened for two years until Suresh introduced Jaya Sudhir to DST of NSSB in early October 2012. By that time, NTT had been incorporated and DST and Suresh were looking for an investor.

[37] Jaya Sudhir became the 'white knight' who assisted the joint venture project to solve its financial woes. He procured external financing from Exim Bank for the Vale project. He also paid for 10% of NSSB's 20% stake in NTT when the joint venture ratio was altered to 80:20 with AMSB being the majority shareholder. Jaya Sudhir actively participated in the affairs of NTT to the extent that he was even invited to board meetings. After obtaining financing, the Vale project took off and was awarded a USD200m project.

[38] Meanwhile, Jaya Sudhir did not at the outset directly take a stake in NTT because according to him, he did not want to give any personal guarantees for the external financing. However, he said that it was always understood that he would participate in the equity of NTT directly in the future. Meanwhile, Jaya Sudhir right in the shares of NTT would be held by AMSB on his behalf. He said this amounted to 50% of NTT shares. However, the dispute in these appeals is only on the 10% NTT shares that were transferred to him.

[39] To support his case, Jaya Sudhir at the trial referred to the initial drafts of the shareholders agreement to show that he can participate in the equity of NTT directly. He had also signed a letter dated 7 December 2012 which says that his participation is at the level of NTT and not AMSB. He also referred to another letter that is a re-drafted version of the same letter by NSSB solicitors which is consistent with his claim. He also referred to a meeting held in Singapore on 16 January 2016 between him, his adviser and DST. He said DST did not dispute his right to 50% of the shares in NTT. In short, Jaya Sudhir asserted that the 'collateral understanding' that he was to participate in NTT existed from the beginning of his involvement in the joint venture.

[40] We shall now address the points raised by counsel for Jaya Sudhir who

A argued why the learned trial judge erred in rejecting the existence of the 'collateral understanding'.

B **[41]** Counsel for Jaya Sudhir submitted that the learned trial judge misjudged the pleadings by saying the term 'collateral understanding' is not stated to be an enforceable contract. The 'collateral understanding' according to counsel is intended to create legal relations and that the nomenclature used is irrelevant. In our view, the learned trial judge did not commit any error in pointing this out. Even at one point in his testimony, Jaya Sudhir referred to the C compromise between the parties with respect to the 'collateral understanding' as a 'gentlemen's agreement'. We are mindful that what a witness says about a matter of law does not bind the court necessarily. However, with respect to the argument that the learned trial judge misjudged the pleadings, we find that nothing much turns on it for this reason. It is true that the learned trial judge D did say in para [196] that the claim would come to nought if what is pleaded is merely an 'understanding' and not a binding contract. However, from para [200] onwards, the learned trial judge painstakingly examined the contemporaneous documents in detail in respect of the existence of the 'collateral understanding' and whether it bound the parties, particularly NSSB E and concluded that it did not exist.

[42] The learned trial judge noted that DST or Suresh acknowledged the contribution of Jaya Sudhir as a 'white knight' who had come to rescue the Vale project of NTT by providing capital injection and assisting to procure external F financing. DST did not deny it in the emails or in his court testimony. However, the question that the learned trial judge endeavoured to answer on a balance of probabilities is whether Jaya Sudhir had a legal right to participate in the joint venture by directly taking a stake in NTT given the fact that the shareholders agreement made no mention of it. Moreover, it contained a G pre-emption clause that treated all non-parties to the shareholders agreement as strangers without any exception whatsoever.

[43] For this purpose, as we said earlier, he examined the critical emails that passed between the parties before and after the execution of the shareholders H agreement. The learned trial judge found that in September of 2012, DST and Suresh contemplated an investor taking direct equity in NTT. However, at this point, there can no question of the 'collateral understanding' as discussion on the participation on any third-party investor was at the preliminary stage.

I **[44]** However, the learned trial judge's analysis of all the emails or letters exchanged by the parties subsequent to the involvement of Jaya Sudhir does not show the existence of the 'collateral understanding'. Some of the letters, for example the letter dated 7 January 2012 issued by Jaya Sudhir only recorded what he wanted but, in the replies, subsequent to it by DST or Suresh, there is

no evidence that points to a concluded arrangement about the participation of Jaya Sudhir in the equity of NTT. Instead in the letters and emails, reference was made to the possibility that Jaya Sudhir would participate at the level of AMSB. It is also important to note that Suresh who gave evidence to support Jaya Sudhir at the trial had even said in the said emails that the only changes in shareholders and directors will be at AMSB and not at NTT. For this reason, the rejection of his evidence by the learned trial judge cannot be faulted as his court testimony was inconsistent with his letter and emails regarding the participation of Jaya Sudhir in the equity of NTT.

[45] All the relevant letters had been thoroughly analysed and referred to in the judgment of the High Court. The learned trial judge also considered the shareholders agreement in its final form. It did not admit any room for the existence of the 'collateral understanding' because of the strict pre-emption clause. The learned trial judge pointed out that it may well be that some clauses in the earlier drafts of the shareholders agreement allowed Jaya Sudhir to participate in the equity of NTT. These drafts were given to Jaya Sudhir. The said clauses were removed subsequently and replaced with clauses that allowed Jaya Sudhir to participate only in the equity of AMSB. The learned trial judge said that this fact 'speaks volumes in that this arrangement was reached deliberately by the parties'. We have no reason to disagree with this conclusion as it is consistent with other correspondence that passed between the parties. And it clearly contradicts the claim of Jaya Sudhir that 'collateral understanding' exists.

[46] In our opinion also, learned trial judge correctly considered the letters written by AMSB to Exim Bank dated 30 November 2015 and 18 April 2016. The letters show that the AMSB relied on cl 20.5 of the shareholders agreement to transfer the shares. There was no reliance on the so-called 'collateral understanding'. But cl 20.5 of the shareholders agreement as noted by the learned trial judge, pertained to a change of shareholders in either AMSB or NSSB and not NTT.

[47] For all the above reasons, we are of the view that the High Court's finding that the so-called 'collateral understanding' did not exist is not plainly wrong and that interference with this finding of fact is clearly not warranted.

[48] We also agree with the learned trial judge that the claim based on estoppel that creates legal relations also fails as it was not pleaded and appears to be an afterthought. Furthermore, as the trial judge noted, the estoppel argument based on the 'collateral understanding' argument which Jaya Sudhir has failed to establish and is therefore 'bereft of foundation'. Jaya Sudhir also claimed that AMSB held 50% of NTT shares in trust for him. However, as we said earlier, only 10% shares of NTT are disputed by the main adversaries, ie

Jaya Sudhir and DST/NSSB in these appeals. Jaya Sudhir did not seek any relief against AMSB for 50% of the NTT shares purportedly held in trust on his behalf by AMSB.

[49] In the premises, Appeal 1904 is dismissed with costs.

APPEAL 1906

[50] This appeal arises from Suit 113 where NSSB sued Jaya Sudhir. The High Court found that the tort of inducement to breach a contract and the tort of dishonest assistance succeeded against Jaya Sudhir. An injunction was granted for the re-transfer of the 100,000 NTT share from Jaya Sudhir to AMSB. Jaya Sudhir has appealed against this decision whereas AMSB has not appealed against the dismissal of the other causes of action, ie inducement to breach fiduciary duty and knowing receipt.

[51] Jaya Sudhir raised a preliminary point in this appeal. His counsel submitted that the claims against Jaya Sudhir are all 'on an accessory/secondary liability basis' and are therefore, 'unsustainable' given that there ought to be a finding made on the principal/primary liability issue, which is currently pending before the arbitration. Thus, primary liability is a live issue in the arbitration and not in the court. Therefore, the High Court ought not have a finding on primary liability. Furthermore, it would be breach of the rules of natural justice as AMSB and NTT are not parties in Suit 113.

[52] This issue was addressed by the High Court in paras [275] to [287]. The two suits were consolidated. Both AMSB and NTT were parties in Suit 165 which was tried together with Suit 113 where the issue of primary and secondary liability arose. Therefore, AMSB and NTT had the requisite knowledge to intervene in Suit 113 but did not. We also agree with the reasoning of His Lordship, especially the principle he quoted from *Lumley v Gye* (1953) 118 ER 749 that a tortfeasor who procures the wrong is a joint wrong-doer and may be sued either alone or jointly with the agent, in the appropriate action for the wrong complained of.

[53] For that reason, we would agree with the argument of counsel for DST and NSSB that a plaintiff is not required to sue and obtain judgment against all tortfeasors at the same time or in the same action. In the instant case, we note that NSSB and the AMSB have brought the issue of breach of the shareholders agreement to arbitration because they are bound to do so by the arbitration agreement contained in it. As stated by the trial judge, to accede to the preliminary point raised by Jaya Sudhir and dismiss Suit 113 would have caused manifest injustice.

[54] In respect of merits of the findings of the High Court in respect of the tort of inducement of the breach of contract, we find that appellate interference is not warranted. As found by the High Court, the ingredients of this tort were proven. There is no serious dispute that it was Jaya Sudhir who requested for the transfer of the 10% NTT shares without complying with the pre-emption clause in the shareholders agreement. He certainly knew of the existence of the shareholders agreement and could have requested a copy of the same. It bears noting that he admitted receiving previous draft copies of the same. He also signed the deed of ratification and accession that refers to the shareholders agreement. The learned trial judge also rightly found that there was intent on the part of Jaya Sudhir, as he could not have effected the transfer of shares into his own name without procuring a breach of the shareholders' agreement. As for the honest belief allegedly held by Jaya Sudhir that the 'collateral understanding' existed, given the surrounding circumstances and the finding of the learned trial judge that it did not exist in a case where all the terms were expressly set out in the shareholders agreement between the main parties and which he was aware of, we find that the rejection of such belief was entirely proper. In the premises, we find no appealable error.

[55] As for the tort of dishonest assistance, we would agree with the learned trial judge that the ingredients for this tort were established as well and that appellate interference is not warranted. The High Court correctly found that by the terms of the shareholders agreement, AMSB, NSSB and NTT owed fiduciary duties to each other. Jaya Sudhir in causing the transfer of the shares in question to himself by requesting the same from Suresh in violation the pre-emption clause clearly assisted in the breach of the shareholders agreement. We therefore find that the injunctive order granted for re-transfer of the shares to AMSB to be proper based on authorities the learned trial judge cited. In conclusion Appeal 1906 is dismissed with costs of RM50,000 in favour of the respondent.

[56] As for NSSB's cross-appeal in respect of the exclusion of two emails, we had already dismissed it earlier on a preliminary point that it should not have been taken up by way of cross-appeal. As for the cross-appeal of AMSB, it is against the part of the judgment in Suit 165 wherein the High Court dismissed Jaya Sudhir's claim. This cross-appeal in basically in support of Jaya Sudhir claim as argued by counsel for NSSB. Since, the claim of Jaya Sudhir based on 'collateral understanding' has failed, we accordingly for the same reasons, dismiss this cross-appeal with costs.

CONCLUSION

[57] Appeal 1904 is dismissed with costs of RM50,000 in favour of the first and second respondents jointly. No order as to costs in favour of third and

fourth respondents in Appeal 1904. Appeal 1906 is dismissed with costs of RM50,000 in favour of the respondent. In respect of encl 92 in Appeal 1904, costs of RM10,000 in favour of Jaya Sudhir. In respect of the cross-appeal of the third respondent in Appeal 1904, it is dismissed with costs of RM25,000 in favour of the first and second respondents.

Appeal 1904 dismissed with costs of RM50,000 in favour of first respondent (DST) and second respondent (NSSB) jointly; Appeal 1906 dismissed with costs of RM50,000 in favour of respondent (NSSB); costs of RM10,000 awarded to Jaya Sudhir in respect of encl 92 of Appeal 1904; cross-appeal of third respondent in Appeal 1904 (AMSB) dismissed with costs of RM25,000 in favour of first respondent (DST) and second respondent (NSSB.

Reported by Dzulqarnain Ab Fatar